No. 76-418

In the Supreme Court of the United States

OCTOBER TERM, 1977

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC., AND NORMAN SCOTT, PETITIONERS

v.

SMITHSONIAN INSTITUTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals, *en banc* (Supp. Pet. App. 49a–99a), is reported at 566 F. 2d 289. An earlier opinion of the court of appeals reversing the district court's denial of petitioners' motion to vacate and reenter summary judgment for defendants is reported at 500 F. 2d 808.

JURISDICTION

The original judgment of the court of appeals was entered on June 28, 1976. That judgment was vacated, and a new judgment was entered by the court, *en*

banc, on September 16, 1977. The original petition for a writ of certiorari was filed on September 22, 1976. A supplement to the petition was filed on November 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction over the appeal because petitioners failed to file a timely notice of appeal.

2. Whether federal government officials have an absolute rather than a qualified immunity in a libel action seeking damages from them personally for acts done in the performance of their official duties.

3. Whether the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.,* bars damage suits for libel against the Smithsonian Institution.

STATUTES AND RULES INVOLVED

Pertinent statutes and rules are reproduced in the appendix, pp. 1A–7A, *infra.*

STATEMENT

Petitioners, a corporation and its principal stockholder, seek review of an *en banc* decision of the Court of Appeals for the District of Columbia Circuit, holding that the district court properly dismissed a libel action against the Smithsonian Institution and its officers sued in their official capacity, and that respondent Evans, an employee of the Smithsonian sued personally, was entitled to assert a defense of absolute immunity. The court remanded the

case for further proceedings to determine whether Evans was acting within the scope of his employment.

In February and March of 1970, the Smithsonian Institution received two inquiries from officials of the Colombian National Ministry of Education inquiring about the responsibility and scientific competence of petitioners with regard to underwater archeological explorations that the Colombian government contemplated. The first communication was sent by two officials of the Colombian Cultural Institute to the Director of the Smithsonian Institution. Court of Appeals App. 17. The second letter was from Professor Alicia Dussan de Reichel, the Chief of the Division of Museums and Restoration of the Colombian Cultural Institute, to Dr. Betty Meggers, a research associate at the Department of Anthropology of the Smithsonian's Museum of Natural History. Court of Appeals App. 14–15.

On March 11, 1970, Dr. Clifford Evans, Jr., as chairman of the Department of Anthropology, sent a letter to Professor Dussan commenting upon the capabilities of the petitioners. Court of Appeals App. 18. The letter, which petitioners allege to be libelous, was critical of petitioners' scientific competence.

Petitioners filed suit in the United States District Court for the District of Columbia, seeking $2,000,000 in damages from the Smithsonian Institution, three of the Institution's regents (Chief Justice Warren E. Burger, Vice President Spiro T. Agnew, and Senator J. William Fulbright) and Dr. Evans. Petitioners

sought damages from the defendant officials in their official capacity, as well as damages from Dr. Evans personally, for defamation based on the letter he sent.

The district court granted summary judgment for the Smithsonian Institution and the regents, concluding that the Federal Torts Claims Act expressly exempted them from suit for libel. The district court also granted summary judgment for Dr. Evans on the ground that, because he had made the statements within the scope of his duties as a Smithsonian employee, he was absolutely immune from suit (Pet. App. 45a).

The court of appeals affirmed the district court's decision regarding the Smithsonian and the regents, holding that 28 U.S.C. 2680(h) barred suits for libel against government agencies and that the Smithsonian is within that category (Pet. App. 2a–11a). With regard to the immunity defense raised by the individual defendant Evans, however, the panel remanded the case to the district court to determine whether Dr. Evans was entitled to absolute or qualified immunity (Pet. App. 11a–30a).

Reconsidering the case *en banc,* the court of appeals held that under *Barr* v. *Mateo,* 360 U.S. 564, Dr. Evans had absolute immunity for statements made within the scope of his duties as an Institution employee (Supp. Pet. App. 50a–59a). The court, however, remanded the case for a determination whether Evans was acting within the scope of his employment (Supp. Pet. App. 59a). With respect to the claim against the Smithsonian and the regents, the *en banc* court reinstated the portion of the original panel decision holding that the Tort Claims Act exempted them from suit for libel (Supp. Pet. App. 50a–51a, n. 2).

ARGUMENT

I. THE JURISDICTIONAL ISSUE

Although we have not raised the issue by cross-petition, we believe that the court of appeals was without jurisdiction over the appeal in this case because petitioners failed to file a timely notice of appeal from the district court's judgment. This Court has frequently addressed such jurisdictional questions even though they were not raised below or presented by the parties to this Court. See, *e.g., Schlesinger* v. *Councilman,* 420 U.S. 738, 743; *Gutierrez* v. *Waterman Steamship Corp.,* 373 U.S. 206; *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459. We submit, therefore, that the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to that court with instructions to dismiss the appeal.

On January 17, 1972, the district court entered an order granting summary judgment in favor of respondents (Pet. App. 45a). Petitioners apparently did not learn of the order until November 20, 1972, when it was revealed during a conversation with the trial judge's clerk. On December 4, 1972, petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and re-enter the summary judgment in order to preserve their right to appeal.

Respondents did not oppose the motion. The district court denied the motion on December 19, 1972, and petitioners appealed. 500 F. 2d at 809.

The court of appeals reversed the decision of the trial court on June 26, 1974, holding that a "trial court may vacate and re-enter a judgment under Rule 60(b) to allow a timely appeal when neither party had actual notice of the entry of judgment, when the winning party is not prejudiced by the appeal, and when the losing party moves to vacate the judgment within a reasonable time after he learns of its entry" (500 F. 2d at 810). The district court then vacated its earlier judgment and entered a new one on July 31, 1974. Petitioner filed a notice of appeal from that judgment on August 16, 1974.

A timely notice of appeal is "mandatory and jurisdictional" under Rule 4(a) of the Federal Rules of Appellate Procedure and 28 U.S.C. 2107. *United States* v. *Robinson,* 361 U.S. 220, 229.[1] Because the government is a party in this case, petitioners' notice of appeal should have been filed within 60 days of the entry of summary judgment, that is, by March 18, 1972. Petitioners' notice of appeal was filed on August 16, 1974, well beyond the 60-day appeal period and any 30-day extension that might have been granted for "excusable neglect." 28 U.S.C. 2107; Rule 4(a), Fed.R.App.P.

[1] The importance of Rule 4(a) in setting a " 'definite point of time when litigation shall be at an end * * *' " was reaffirmed in *Browder* v. *Director, Department of Corrections of Illinois*, No. 76-5325, decided January 10, 1978, slip op. 7.

Thus, the court of appeals had jurisdiction over this case only if some rule permitted entry of a new judgment from which a timely appeal could be taken. Although the court of appeals found such authority in Rule 60(b), Fed.R.Civ.P., relief under that rule may not be obtained merely because the district court clerk fails to comply with the mandate in Rule 77(d), Fed.R.Civ.P., "[i]mmediately upon the entry of an order or judgment * * * [to] serve a notice of the entry by mail * * * ."

After this Court's decision in *Hill* v. *Hawes,* 320 U.S. 520, sustaining the district court's power itself to do what the court of appeals directed it to do here, Rule 77(d) was amended to deal with this precise situation.[2] The 1946 amendments added the following

[2] In clarifying the intent of the amendment the Advisory Committee on Rules stated (Notes of Advisory Committee on 1946 Amendment to Fed.R.Civ.P. 77(d)):

"Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment."

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sentence:

> Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

That language makes clear that a motion to vacate and reenter a judgment under Rule 60(b) cannot properly be used to extend the time for appeal where a party has simply failed to learn of the entry of the judgment because of a Rule 77(d) violation. *In re Morrow,* 502 F. 2d 520 (C.A. 5); *Lathrop* v. *Oklahoma City Housing Authority,* 438 F. 2d 914 (C.A. 10); *Weedon* v. *Gaden,* 419 F. 2d 303, 307–308 (C.A. D.C.). As the Fifth Circuit has observed: "To permit an appeal where there is failure to notify, without more, would be opposed to the clear wording and intent of Rule 77(d)." *In re Morrow, supra,* 502 F. 2d at 523. See also *Klapprott* v. *United States,* 335 U.S. 601; *Ackermann* v. *United States,* 340 U.S. 193. In the present case, there are no unusual circumstances that would justify deviation from that rule. Compare *Smith* v. *Jackson Tool & Die, Inc.,* 426 F. 2d 5 (C.A. 5).

II. THE MERITS

1. Petitioners contend (Supp. Pet. 3–11) that government officials such as Dr. Evans have only a qualified, not an absolute, immunity from libel suits based on statements made within the ambit of their employment. For the reasons stated in our brief in *Butz* v.

Economou, No. 76–709,[3] argued November 7, 1977, we believe that contention is foreclosed by this Court's decision in *Barr* v. *Matteo,* 360 U.S. 564. But since the decision in *Economou* may control that issue, the Court should defer acting on the petition pending that decision.[4]

2. Petitioners also challenge (Pet. 8–16) the court of appeals' holding that the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.,* bars damage suits for libel against the Smithsonian Institution and the regents. That decision is correct and does not warrant review by this Court.

a. The United States cannot be sued without its consent. See *United States* v. *Testan,* 424 U.S. 392, 399; *Dalehite* v. *United States,* 346 U.S. 15, 30. With regard to tort actions, Congress in 1946 enacted a comprehensive statutory scheme (the Federal Tort Claims Act), providing for selective waiver of the government's sovereign immunity in certain of such cases. By its terms the Act creates an exclusive remedy (28 U.S.C. 2679) against the United States for injuries wrongfully caused by any "employee of the Government," including officers and employees of "any federal agency" (28 U.S.C. 1346(b), 2671) and defines "[f]ederal agency" to include "* * * independent establish-

[3] We are sending petitioners a copy of our brief in *Economou.*

[4] The court of appeals remanded the case for a determination whether Dr. Evans was acting within the scope of his employment. Should the district court conclude that he was not, that would obviate any need for this Court to decide whether he is entitled to absolute immunity.

ments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States * * * ." 28 U.S.C. 2671. Congress also provided that the Act would not apply to specified categories of cases, including "[a]ny claim arising out of * * * libel * * * ." 28 U.S.C. 2680(h).

Although petitioners argue that the exception in Section 2680(h) means only that the preexisting common law remains in force, the court of appeals correctly concluded that "[Section] 2680(h) should be read as an affirmative grant of immunity to 'federal agencies' in the types of deliberate tort cases which it describes" (Supp. Pet. App. 66a). In *Dalehite* v. *United States,* 346 U.S. 15, this Court, applying the analogous exception in 28 U.S.C. 2680(a) for performance of discretionary functions, held that the legislative intent in enacting the Section 2680(a) exception was "to preclude any possibility that the bill might be construed to authorize suit for damages against the Goverment growing out of an authorized activity * * *." 346 U.S. at 30. There is no reason to believe that Congress, when it "sought to systematize and centralize the immunity laws" (Supp. Pet. App. 66a), intended to preserve the possibility that federal agencies, while exempt from suits growing out of the exercise of discretionary functions, might nonetheless be subject to suits for libel. See also *Goddard* v. *District of Columbia Redevelopment Land Agency,* 287 F. 2d 343, 345 (C.A. D.C.), certiorari denied, 366 U.S. 910; *United States* v. *Delta Industries, Inc.,* 275 F.

Supp. 934, 936–937 (N.D. Ohio); *James* v. *Federal Deposit Insurance Corporation,* 231 F. Supp. 475, 477 (W.D. La.); *Freeling* v. *Federal Deposit Insurance Corporation,* 221 F. Supp. 955, 956–957 (W.D. Okla.).[5]

While the Smithsonian Institution was not immune from suit prior to the Tort Claims Act, the language and legislative history of the Act reveal a congressional intent to establish a uniform rule for all federal agencies. In Section 2679(a), therefore, Congress made clear that the Act is the exclusive remedy available to plaintiffs in money damage actions even though an agency elsewhere is authorized to be sued in its own right. Explaining 28 U.S.C. 2679(a), the reports of both chambers make the following statement:

> This will place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies. In both cases, the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act, as for example, the Suits in Admiralty Act. It is intended that neither

[5] Contrary to petitioners' assertion (Pet. 8–10), there is no conflict between the decision below and the decisions of other courts of appeals. In the cases cited by petitioners, suit was permitted against the United States, despite the fact that such suit fell within one of the exceptions of Section 2680, only because other statutes authorized the suit. See *Baker* v. *F&F Investment Co.* 489 F. 2d 829 (C.A. 7); *DeBardeleben Marine Corp.* v. *United States,* 451 F. 2d 140 (C.A. 5).

> corporate status nor 'sue and be sued' clauses shall, alone, be the basis for suits for money recovery sounding in tort. [H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33–34 (1946).]

Thus, once it has been established that the defendant is a federal agency, there is no need for further inquiry into its status (Pet. App. 8a–9a).

b. The court of appeals correctly concluded (Supp. Pet. App. 62a–63a) that the Smithsonian Institution is a federal agency under the Tort Claims Act. As the court noted (Supp. Pet. App. 62a–63a), although the "Smithsonian has a substantial private dimension, * * * the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental role in funding and oversight, make the institution an 'independent establishment of the United States,' within the 'federal agency' definition."

Moreover, the Smithsonian Institution is a corporation primarily acting as an instrumentality or agency of the United States within the meaning of that definition. Approximately 75 percent of the Institution's operating funds come from federal appropriations (General Hearings on Smithsonian Institution before the subcommittee on Library and Memorials of the House Committee on House Administration, 91st Cong., 2d Sess. 253, 321(1970) ("Hearings")). The vast majority of its employees are federal civil service employees rather than private employees. *Id.* at 253. Eight of the 17 Regents of the Institution acquire their positions because they hold other high positions in the federal government. 20 U.S.C. 42.

The Institution is audited periodically by the General Accounting Office, a federal agency that is an arm of Congress. Hearings, *supra,* at 362–396. The original Smithsonian endowment is deposited in the United States Treasury and receives interest from the United States Government. 20 U.S.C. 54. Both Congress and the General Accounting Office carefully review the federal appropriation to the Smithsonian. 20 U.S.C. 49.[6]

In short, the substantial control of the United States over the Institution, the degree of federal funding, and the federal government's interest in "the increase and diffusion of knowledge among men * * *"[7] demonstrate that the Smithsonian is a federal agency for purposes of the Tort Claims Act. Cf. *United States* v. *Orleans,* 425 U.S. 807; *Logue* v. *United States,* 412 U.S. 521.

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[6] See also 20 U.S.C. 57, 58, 79b, which impose restraints and limits of a varying nature on the utilization of funds by the Smithsonian.

Moreover, the language of the Smithsonian's enabling legislation (20 U.S.C. 41) is similar to the definition of "federal agency" in the Tort Claims Act, which includes "independent establishments of the United States." 20 U.S.C. 41 reads in pertinent part:

"The President, the Vice President, the Chief Justice, and the heads of executive departments are constituted an *establishment* by the name of the Smithsonian Institution for the increase and diffusion of knowledge among men * * *." (Emphasis added.)

[7] 20 U.S.C. 41; see note 6, *supra.*

CONCLUSION

The Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to that court with instructions to dismiss the appeal for want of jurisdiction. Alternatively, the Court should dispose of this case in light of its disposition of *Butz* v. *Economou*, No. 76–709.

Respectfully submitted.

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APPENDIX

20 U.S.C. 41. INCORPORATION OF INSTITUTION

The President, the Vice-President, the Chief Justice, and the heads of executive departments are constituted an establishment by the name of the Smithsonian Institution for the increase and diffusion of knowledge among men, and by that name shall be known and have perpetual succession with the powers, limitations, and restrictions hereinafter contained, and no other.

28 U.S.C. 1346. UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(b) Subject to the provisions of chapter 171 of this title [§§ 2671–2680 of this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or ommission occurred.

28 U.S.C. 2671. DEFINITIONS

As used in this chapter [§§ 2671–2680 of this title] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. 2679. EXCLUSIVENESS OF REMEDY

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

* * * * *

28 U.S.C. 2680. EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute, or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * *

28 U.S.C. 2107. TIME FOR APPEAL TO COURT OF APPEALS

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within 30 days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be 60 days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within 90 days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within 15 days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

RULE 4(A), FEDERAL RULES OF APPELLATE PROCEDURE

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party, may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules:

(1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

RULE 60(B), FEDERAL RULES OF CIVIL PROCEDURE

RELIEF FROM JUDGMENT OR ORDER

* * * * *

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether

heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 77(D), FEDERAL RULES OF CIVIL PROCEDURE

* * * * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a

note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

U S GOVERNMENT PRINTING OFFICE: 1979